

The Fund argues there was no evidence to establish respondent insolvency. The Fund further argues that if an insurance carrier is insolvent, compensation is paid by the Kansas Insurance Guaranty Fund or, for a Missouri resident, by the Missouri Guaranty Fund. Accordingly, the Fund argues the Administrative Law Judge exceeded his jurisdiction ordering the Workers Compensation Fund to provide medical benefits.

FINDINGS OF FACT

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing held on February 19, 2002, the claimant and the Workers Compensation Fund appeared but the respondent and its insurance carrier did not appear for the hearing. The Fund admitted compensability of the claim.

Claimant testified he was a trainer for respondent's truck driving school. On August 24, 2000, claimant injured his right leg when he slipped and fell off a truck. Arthroscopic surgery was performed with no improvement.

The respondent's insurance carrier paid for the arthroscopic surgery and was providing benefits until its bankruptcy. Respondent had closed its school in the state of Kansas.

Because of claimant's continuing problems, a total knee replacement was recommended but claimant was advised to postpone such procedure as long as possible because of his age. Claimant was prescribed Celebrex which helped claimant manage the pain and continue to work. Accordingly, claimant's request at preliminary hearing was that such prescription medication be provided.

At the conclusion of the preliminary hearing, the Fund argued because claimant was a Missouri resident, he should proceed against the Missouri Guaranty Fund. In addition, the Fund argued there is nothing to indicate respondent was insolvent and unable to pay.

CONCLUSIONS OF LAW

This is an appeal from a preliminary hearing order. The issue raised by Workers Compensation Fund is not a jurisdictional issue and is not subject to review at this stage of the proceedings.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an Administrative Law Judge exceeded his or her jurisdiction. K.S.A. 44-551. This includes review of the preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term

“certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Carpenter*,¹ the Court held:

The term “certain defenses” in K.S.A. 1998 Supp. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act. (Syllabus 3.)

The challenge to the order for benefits to be paid by the Fund does not raise an issue subject to appeal from a preliminary order. Impleading of the Fund gives the Administrative Law Judge jurisdiction over the Workers Compensation Fund. The fact that the case involves an injury arising out of and in the course of employment gives the Administrative Law Judge jurisdiction over the subject matter.

The decision to require payment by the Fund constitutes a legal ruling that the Fund should have the burden of proving ability to pay or existence of insurance coverage. Whether this ruling is correct or incorrect is not for the Board to decide at this stage of the proceedings, it is a ruling which the Administrative Law Judge has the jurisdiction to make. Moreover, the claimant's entitlement to medical benefits does not raise a jurisdictional issue subject to review from a preliminary hearing. The Judge did not exceed his jurisdiction in granting claimant's request for medical benefits.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.²

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.³

AWARD

WHEREFORE, the Board dismisses the Workers Compensation Fund appeal of the March 8, 2002, Order of Administrative Law Judge Steven J. Howard.

IT IS SO ORDERED.

¹*Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

²*Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

³K.S.A. 44-534a.

Dated this _____ day of April 2002.

BOARD MEMBER

c: Richard C. Wallace, Attorney for Claimant
J. Paul Maurin III, Attorney for WC Fund
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director